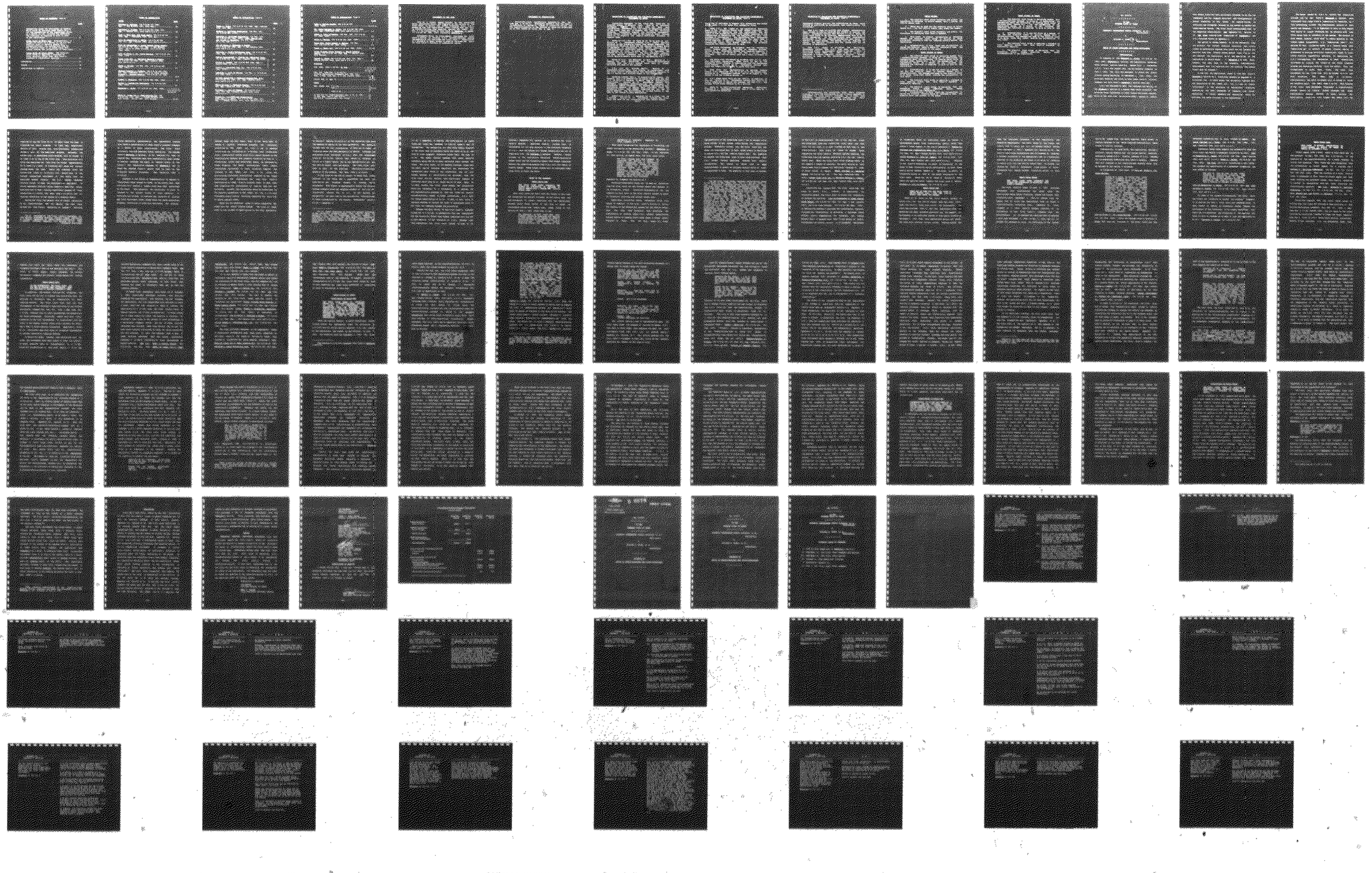

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STATEMENT OF THE CASE

This is a direct appeal brought by the prevailing party, plaintiffs below, who complain of the failure of the trial court to enjoin the school financing bill, S.B.1, passed by the 71st Legislature, after finding that the bill is unconstitutional when measured against TEX. CONST. art. VII, § 1 as interpreted by this Court in Edgewood v. Kirby, 777 S.W.2d 391 (Tex. 1989) (hereafter Edgewood I).

Defendants below by cross-appeal challenge the trial court's action in holding S.B.1 unconstitutional before implementation and challenge the trial court's substitution of a standard of equal access to similar revenues per pupil for this Court's standard of substantial equity.

STATEMENT OF JURISDICTION

Plaintiffs claim jurisdiction pursuant to Tex. Gov. Code Ann. § 22.001(c). Defendants maintain that the Court's jurisdiction is limited to issues of injunctive relief and the constitutionality of the statute at issue and proscribed as to fact issues by 140(b) Tex. R. App. P.

OBJECTIONS TO PLAINTIFFS AND PLAINTIFF-INTERVENOR'S STATEMENT OF FACTS

Plaintiffs represent to the Court that there are no disputed issues of material fact. This is an incorrect statement. Because this Court does not have fact jurisdiction, Defendants will not offer an exhaustive review of the facts that are in dispute, but only the following examples. Defendants dispute the following statements, among others, offered as fact by the district court because there is no actually and legally sufficient evidence to support them:

1. Parts of S.B.1 are so vague as to be no plan at all. Opinion at 7. Defendants contend S.B.1 offers specific guidance to the Foundation School Fund Budget Committee, the Legislative Education Board and the Legislative Budget Board to implement in conjunction with future Legislatures a constitutionally "efficient" system of finance. Testimony was adduced at trial to prove this. No testimony was adduced at trial to refute it. The only testimony contrary was that various witnesses did not know what decisions future decision-makers would make in implementing S.B.1.

2. Parts of S.B.1 are destined to fail. Opinion at 7. Experts for both Plaintiffs and Plaintiff-Intervenors conceded that the S.B.1 system could work if proper decisions are made in the process.

3. S.B.1 will not provide equity. Opinion at 7. Defendants contend that this finding is inconsistent with the trial court's determination that defendants' exhibits in the J-1 series were accurate based on the assumptions.

4. Anything greater than a 5% possibility of chance, for example, only a 6% possibility of chance would pass the test of § 16.001(c)(1) because it would "not be statistically significant." Opinion at 12. Defendants contend this statement completely mischaracterizes the testimony of Defendants' expert witnesses. The experts testified on what statistical measure of equity were available since the Foundation School Fund Budget Committee had not set an equity measure. Any fact-finding as to what action it may take in the future is pure speculation.

5. Subdivision (c)(2) ... operates not as a floor, but as a ceiling. Opinion at 12. Defendants contend the trial court has read its own interpretation into future events.

There was no testimony to support this contention and recent action under § 16.256 makes this assumption false.

6. Under S.B.1, the report of the Legislative Education Board to the Foundation School Fund Budget Committee, the Commissioner of Education and the Legislature, and the report of the Foundation School Fund Budget Committee to the Commissioner of Education and the Legislature is only "for purposes of information." The Legislature then determines appropriations. Defendants contend that Tex. Educ. Code § 16.256 requires a specific reservation of funds by the Foundations School Fund Budget Committee. No evidence countered the State's position on this.

7. The State introduced no evidence that the Foundation School Program even yet provided an adequate minimum. Opinion at 16. Defendants contend that research supports a basic allotment of $2100.00 for the § 16.101 basic allotment. The 1991-92 school year has a basic allotment of $2128.

8. The State also introduced no evidence that all or even most legitimate educational needs could be met by the Foundation School Program in combination with the Guaranteed Yield Program. Opinion at 16. Defendants contend that there was compelling evidence to prove this fact.

9. Even after full implementation at maximum funding levels, S.B.1 equalizes only up to $1.18 in the second tier. Opinion at 16. Defendants contend the $1.18 figure is not locked in and the evidence proved it.

10. S.B.1 added about $518,000 for 1990-91, an addition of only 4%. Opinion at 21. Defendants contend that this is an unfair comparison of apples and oranges, and that S.B.1 has already raised State funding by $1.3 billion.

11. There is no "self-correcting" mechanism. Additional Findings at 3. Defendants contend that § 16.203 sets up a self-correcting mechanism.

Defendants dispute entirely the elaborations on these facts offered by plaintiffs as undisputed, most significantly the following:[1]

1. That S.B.1 does not provide each student substantially equal access to similar revenues per student at similar tax effort. Defendants contend that Exhibit J.1 at 4, which the trial court found to be accurate, demonstrates this to be a false assumption. As the defendants have consistently maintained, if the tax response assumptions upon which the exhibit is based change, the system will be required to adjust. Any implicit finding that the system will not be adjusted is speculative.

2. That S.B.1 makes no provision for facilities. Defendants contend that S.B.1 does make provision for facilities within a reasonable phase-in period. Until a facilities study under Tex. Educ. Code § 16.401 is completed, a formula component cannot be drafted. Standby provision is made in the guaranteed yield program for facilities.

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[1]Interestingly, the plaintiffs offer their proposed Findings of Fact and Conclusions of Law in their appendix to supplement the trial court's findings. As is clear from defendants' submission of proposed findings and their request for additional findings, these are disputed.

REPLY POINTS

1. The district court acted correctly and within its discretion in refusing to enjoin Senate Bill 1 during the 1990-91 school year.

2. There was no need for the district court to enjoin Senate Bill 1 for the 1991-92 school year under its orders.

3. The district court acted correctly and within its discretion in modifying this Court's mandate.

4. This Court is without jurisdiction to determine whether the district court erred in failing to award plaintiffs' attorney's fees for lobbying efforts before the Legislature.

5. Alternatively, if this Court has jurisdiction to review the district court's award of attorney's fees, the district court was correct in its award.

CROSS POINTS OF ERROR

1. The district court erred in declaring Senate Bill 1 unconstitutional because in doing so it substituted its assumptions about the efficiency of funding which would be achieved under Senate Bill 1 for the assumptions of the Legislature which, as a matter of law, violates the deference the judiciary is required to give to acts of the Legislature.

2. Alternatively, if it was not error as a matter of law for the district court to declare Senate Bill 1 unconstitutional, the assumptions made by the district court in so doing raise fact issues outside the jurisdiction of this court.

3. The district court erred in applying a standard of total equality rather than this Court's standard of substantial equality.

4. The district court erred in declaring that the Foundation School Budget Committee merely makes recommendations to the Legislature.

5. Alternatively, if this Court has jurisdiction to review the district court's award of attorney's fees, the district court was correct in its award.

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No. D-0378

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IN THE
SUPREME COURT OF TEXAS

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EDGEWOOD INDEPENDENT SCHOOL DISTRICT, et al.,
Petitioners,

V.

WILLIAM N. KIRBY, et al.,
Respondents.

* * * * * * * * *

BRIEF OF STATE-APPELLEES AND CROSS-APPELLANTS

* * * * * * * * *

INTRODUCTION

In response to the Edgewood v. Kirby, 777 S.W.2d 391 (Tex. 1989) (Edgewood I) opinion, the Legislature produced, after several special sessions, Senate Bill 1 (hereafter S.B.1). S.B.1 was signed into law by Governor Clements on June 7, 1990. The bill was designed to effect the school finance system beginning on September 1, 1990. Thus, the principal deadline set forth in both Judge Clark's original judgment and this Court's Edgewood I opinion were met.

S.B.1 was designed to meet the language and spirit of the Edgewood I opinion in a manner that would eliminate the existing large variations in local taxing abilities (equity) while at the same time maintaining both a system to assure

that school districts have sufficient revenues to do the job (adequacy) and the support structure and configuration of school districts in the State. No restructuring of districts was attempted, because no one wanted to pursue the consolidation option. The trial court acknowledged that no one supported consolidation. See Appendix III, Opinion at 25. See also, side-by-side comparison of Edgewood I and S.B.1 attached hereto as Appendix I.

The option to revamp Chapter 16 of the Education Code and maintain the current district structure was widely viewed as permissible because this Court did not mandate any specific form that finance reform should take; "we do not now instruct the Legislature as to the specifics of the legislation it should enact... ." Edgewood I at 399. Much, however, has been made of the arguable, contradictory admonishment that "[a] band-aid will not suffice; the system itself must be changed."

In the end, the Legislature chose to view the Court's Edgewood I opinion as a functional mandate as opposed to a structural one. In other words, the obligation imposed upon the Legislature by TEX. CONST. art. VII, § 1 was to insure "efficiency" in the provision of educational financing measured by the dual standards of adequacy and fiscal neutrality. If fiscal adequacy and neutrality could be achieved, the means belonged to the Legislature.

The means chosen by S.B.1 to correct the inequities pointed out by the Court's Edgewood I opinion were consistent with Judge Clark's admonition to "equalize up." This methodology allowed the simultaneous pursuit of both equity and adequacy. It is important to note in this regard that equity in school financing can be achieved with less State money than is currently in the system. The pursuit of such remedy, however, would tend to reduce spending to the lowest common denominator, i.e., "equalizing down." All parties to this litigation agree in a general sense that "equalizing up" in pursuit of school finance equity is preferable to placing artificial constraints (caps) on local school district expenditure patterns. In equalizing up, S.B.1 contemplates the absorption of most unequalized enrichment by raising the levels of the State financed program and absorbing existing local tax effort. This was accomplished in three ways. First, the local fund assignment for the first tier will be raised to $.70 per $100 valuation. Tex. Educ. Code § 16.252(a). Simultaneously, the basic allotment will be raised to $2128 per weighted pupil. Tex. Educ. Code § 16.101. This raising of the local fund assignment "captures" a significantly greater amount of locally raised revenues and frees significantly greater amounts of State dollars for equalization. Districts with higher tax bases will be

required to use the first $0.70 of their local tax base in financing the basic program. In this way, significant amounts of local revenue that were previously unequalized become a part of the equalized program. Secondly, the second tier, or guaranteed yield program, will be raised to at least $.48 on top of the first tier. This provision will raise the equalized tax rate from its former approximately $0.70 level to a level of financing well above the current average State tax rate. Again, the combined first and second tier rates (§ 16.002(b)) will absorb most of the current unequalized enrichment in the State into an equalized system. Finally, the S.B.1 system mandates biennial review to keep the distributions equitable. If future aggregate district taxing behaviors show that school districts are in fact raising significant amounts of local unequalized enrichment, Tex. Educ. Code § 16.001(b) and (c) requires adjustment to the system on a biennial basis.

Having set forth the general rule of fiscal neutrality as the constitutional test for equity, the next issue becomes how much fiscal neutrality is enough.[1] Defining

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[1]As is indicated by the trial court's September 24, 1990 opinion (hereafter Opinion), perfect fiscal neutrality is virtually impossible to obtain absent prohibitive costs in general revenues. Appendix III, Opinion at 30. This (Footnote Continued)

fiscal neutrality operationally, the Legislature treated this Court's modification of Judge Clark's original judgment as a matter of great significance. The trial court originally required absolute fiscal neutrality. The Supreme Court's Edgewood I opinion, at 397 modified the test to require that "districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort." The legislative response to Edgewood I was to adopt the Supreme Court's equity test as part of the financing system's structure. Tex. Education Code § 16.001(b).

Inherent in the notion of "substantially" as opposed to "absolutely" equal access to funds is the notion that some districts will receive a higher yield than that guaranteed by the State. This potential for variations in yield is inherent in the current system of local taxation. If districts are allowed to continue the practice of raising any local enrichment funds (funds above the state guaranteed program), variations in yield are inevitable. The problem,

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(Footnote Continued)
necessitates the process of line drawing, that is, making public policy decisions regarding the balance of costs against the incremental gains in theoretical equity. At some point in the calculation, the incremental gains are simply not worth the cost. The trial court at p. 31 of its opinion stated that reasonable lines could be drawn in balancing costs against theoretical equity.

however, does not end there. Even if the State were to impose a uniform statewide property tax (currently prohibited by TEX. CONST. art. VIII, § 1e) or mandate county-wide tax collection at a uniform rate (Uribe-Luna plan), differential yields would still result because of the Constitutional mandate that property valuation be done on a county-wide, rather than state-wide, basis. As indicated by State Property Tax Board calculations, there remain significant variations in local valuation despite the language of TEX. CONST. art. VIII, § 18. Given the pre-existing structural difficulties inherent in the Texas Constitution, the Legislature has read this Court's modification of Judge Clark's original order to mean that some inequities are permissible, so long as they are not pervasive. Further, the Legislature would be authorized by the specific delegation in TEX. CONST. art. VII, § 1 to make reasonable public policy decisions regarding the balancing of equity against costs.

There are two potential areas in which inequities may creep into the school finance system. The first of these areas is the concept of equalization to the 95th percentile

of wealth.[2] Section 16.001(c)(1) of the education code sets the measure of equity at the 95th percentile. The question becomes what the real consequences of this are in terms of financing above the 95th percentile of wealth. Although the guaranteed yield provision of S.B.1 sets the guaranteed yield at $17.90 for 1990-91, that amount is adjusted to $26.05 or a higher amount set by the appropriation act for the 1991-92 school year and beyond. The lower first year rate is part of the previous, judicially-authorized, phase-in of the program. Tex. Educ. Code § 16.302(a).

If one looks at the $26.05 figure, it means that every district in the State has a guaranteed tax base of $260,500.00 per weighted student in average daily attendance. This figure is approximately double the current average property value per weighted student of $137,441.00. (Plaintiffs' exhibit 208, at 13.) To put matters in perspective, one must look at the prospective distributions of funds contemplated by the statute. Defendants' exhibit J-1 at 3 (Appendix V)

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[2]If all school districts in Texas are arrayed according to the potential property wealth they have to spend on education and that is correlated with the numbers of students in each district, the 95th percentile represents that point in the array where 95% of the students in the state reside in districts with lower property tax wealth per student.

J-1 at 3 (Appendix V) depicts the distribution of State funds and local tax revenues in 1994-95 under a set of assumptions. The assumptions are that every school district in the State that is currently below the level of $1.18 per $100.00 local property valuation raises their tax rate to $1.18. The model further assumes that every district currently above the $1.18 rate, maintains their current tax rates. The trial court, in its amended findings, found that the chart was an accurate depiction, but questioned the assumptions upon which it was predicated. One can only assume, because no justification was provided, that the trial court did not believe that significant numbers of districts would stay at or below the $1.18 rate. Here, as in other places, the trial court adopts the projections which are necessary to a discussion of a statute for pre-implementation purposes as fact and finds the statute unconstitutional, based on these projections. S.B.1 does not freeze equalization at $1.18. It has, in fact, built in research methods to correct the level of guaranteed yield if the local tax response exceeds the projection.

Perhaps the most vexing of the trial court's findings arises out of a series of assumptions that the Legislature and the Foundation School Fund Budget Committee will not act to give meaning to the framework of S.B.1. Phrases like "the Legislature has given itself plenty of room to do

nothing," (Appendix III, Opinion at 11) permeate the trial court's opinion. Appellees readily concede that if adjustments are not made pursuant to the statutory framework of S.B.1, that the system will become unequalized and out of compliance with the Edgewood I mandate. However, recent actions of the Legislative Education Board/Legislative Budget Board and the Foundation School Fund Budget Committee destroy the underlying premise that S.B.1 will not result in drastic change. These recent events will be discussed under Cross Point of Error One below.

BRIEF OF THE ARGUMENT

Reply Point One

THE TRIAL COURT ACTED CORRECTLY AND WITHIN ITS DISCRETION IN REFUSING TO ENJOIN SENATE BILL 1 DURING THE 1990-91 SCHOOL YEAR.

Each court which has dealt with the issues in this case has recognized the pattern followed by the school year and the disruption to school districts and the educational process which would follow if the flow of funds is interrupted during that school year. Judge Clark, in his Opinion of June 1, 1987, noted that it was

> the intention of this court that this Judgment should be construed and applied in such manner as will permit an orderly transition from an unconstitutional to a constitutional system of school financing without the impairing of any

> obligation of contract. Appendix VI, Final Judgment at 9.

This court recognized the importance of "avoid(ing) any sudden disruption in the educational process." Edgewood v. Kirby, 777 S.W.2d 391, 399 (Tex. 1989). In the September 24, 1990 opinion, on appeal here, the trial court wrote:

> The court intends that this judgment be construed and applied to permit an orderly transition from an unconstitutional, inefficient system of public school finance to a constitutional, efficient system of public school finance. To ensure an orderly transition, districts must continue to operate. For districts to continue to operate, the state must be able to levy taxes and enter into contracts.

Appendix II, Judgment and Opinion at 3.

Plaintiff-Intervenors chose not to seek an injunction from the trial court for the current school year because of its disruptive effect. Plaintiff-Intervenors do not now complain to this Court of the trial court's refusal to grant an injunction involving the current school year.

Appellants, plaintiffs below, ostensibly bring this appeal to complain of the trial court's failure to enjoin the funding of the educational system for the 1990-91 school year. Yet, even they recognize that enjoining the distribution of funding under S.B.1 without substituting another method of funding would cause chaos in every school district in Texas. They ask this Court to order

implementation of the Uribe-Luna plan,[3] one of several bills which failed to get enough votes during the legislative process. Defendants contend that the trial court did not abuse its discretion but, in fact, acted wisely in declining to enjoin S.B.1 for the 1990-91 school year. The question of whether the Uribe-Luna plan is more constitutional than S.B.1 raises factual questions outside this Court's jurisdiction. The choice of which plan is more constitutional is purely an advisory opinion which no court is authorized to make. The question in this case is whether

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[3]As the trial court noted, tax-base consolidation seems to run afoul of TEX. CONST. art. VII, § 3 and art. VIII, § 1(e). Plaintiffs' requested relief could involve the State and local districts in serious contractual disputes. The Uribe-Luna plan is not even fully conceptualized at this point. No witnesses during the trial were able to explain how county-wide taxing authority would actually work. Would recapture be the methodology or would some quasi-independent, new taxing authority be created? The answer is not yet clear. Perhaps that is one of the reasons the bill never got out of committee. Additionally, the creation of a plan of this nature would significantly disrupt current taxing authority. To create this kind of disruption on a interim basis, until the Legislature acts, is poor public policy. Finally, appellants' position that Uribe-Luna can be implemented within the currently appropriated revenues is simply wrong. The Uribe-Luna plan requires significantly higher revenues than are currently appropriated. How any appropriation shortfall would be managed is completely unclear. Whether prorations would apply to manage any shortfall has not be decided. The simple assertion that the plan should be implemented presents a completely false picture of the resolution of a myriad of unanswered questions.

or not S.B.1 is constitutional, and, if not, why not. Since the Uribe-Luna plan was before the trial court and that court did not adopt it or make findings of fact that it was constitutional, this Court is bound to assume facts supporting the trial court's decision against adopting the Uribe-Luna plan and against enjoining S.B.1 for the 1990-91 school year. Where the trial court files findings which do not support a theory of recovery, the party relying on that theory must file a request for additional findings in order to avoid waiver on appeal. MBank Abilene v. Westwood Energy, 723 S.W.2d 246, 253 (Tex. App.--Eastland 1986, no writ), citing Crown Life Ins. v. Reliable Machine & Supply, 427 S.W.2d 145, 149 (Tex. Civ. App.--Austin 1968, writ ref'd n.r.e.).

Plaintiffs are correct that the trial court had the power to enjoin S.B.1. However, in exercising its injunctive powers, the trial court is within its discretion to balance the equities. City of Pleasanton v. Lower Nueces River Supply, 263 S.W.2d 797 (Tex. Civ. App. -- San Antonio 1953), rev'd on other grounds, 276 S.W.2d 798 (Tex. 1955). In determining whether a drainage and conservation district violated the Constitution by enlarging a drainage ditch without justly compensating the landowner, the Corpus Christi Court of Appeals held that "[t]he matter of public convenience and general welfare is of paramount importance

in situations where an individual seeks to enjoin a governmental agency from constructing public works that affect a large segment of the public generally." Nueces Co. Drainage and Conservation Dist. No. 2 v. Bevly, 519 S.W.2d 938 (Tex. Civ. App.--Corpus Christi 1975, writ ref'd n.r.e.) citing Mitchell v. City of Temple, 152 S.W.2d 1116, 1117 (Tex. Civ. App.--Austin 1941, writ ref'd w.o.m.). Inherent in the court's discretion to grant an injunction is the power to deny injunctive relief particularly, as here, where public policy reasons demand it. The grant or denial of injunctive relief is left to the sound discretion of the trial court. There can be no abuse of discretion where there are equities which support the trial court's denial. Mitchell v. City of Temple, 152 S.W.2d at 1117.

Reply Point Two

THERE WAS NO NEED FOR THE TRIAL COURT TO ENJOIN SENATE BILL 1 FOR THE 1991-92 SCHOOL YEAR UNDER ITS ORDERS.

There is no error in the trial court's refusal to enjoin S.B.1 for the 1991-92 school year and later years. Under the Court's order such action was unnecessary. The court has provided that if the 72nd Legislature does not establish and make suitable provision for the support and maintenance of an efficient system of free public schools by September 1, 1991, then, upon appropriate motion and proof, the court will consider further relief. "Having stated the

case for continued deference to the legislative and executive departments, the court wants to say loudly and clearly that it cannot and will not forbear drastic action after September 1, 1991." Appendix III, Opinion at 39. The court's continuing jurisdiction and willingness to consider a further injunction at the appropriate time is a sufficient exercise of its authority and there is no error in refusing to enjoin S.B.1 for the 1991-92 school year. Of course, for reasons set forth in defendants' cross points of error, defendants will oppose further injunctive relief in this case.

Reply Point Three

THE TRIAL COURT ACTED CORRECTLY AND WITHIN ITS DISCRETION IN MODIFYING THIS COURT'S MANDATE.

The trial court's order of June 1, 1987, enjoined defendants from distributing any money under the then-current Texas School Financing System and stayed that injunction until September 1, 1989, to afford time for appeal and to allow the Legislature time to enact a constitutionally sufficient plan. Appendix VI, Final Judgment at 7. This Court's mandate consists of an affirmation of the trial court's judgment with two modifications: (1) It delayed the required date of passing a plan from September 1, 1989, to May 1, 1990; and (2) it changed the standard by which the efficiency of the system

was to be judged from one which required equal access to similar revenues to one which required substantially equal access to similar revenues.

Subsequently, in good faith, the Legislature, through a difficult regular session and six called special sessions, eventually passed S.B.1. Clearly, passage of S.B.1 changes the circumstances underlying this Court's mandate. Whether that bill conforms to the constitutional mandate could only be decided by the taking of evidence.

As recognized by this Court in City of Tyler v. St. Louis Railway,

> [w]hen as a court of review this court affirms a judgment of a trial court or enters a judgment which a trial court should have entered, the judgment becomes a judgment of both courts--the trial court and this court. ... In that situation and in the absence of changed conditions it is the duty of the trial court to enforce the judgment as entered; and, if necessary, this court can compel its enforcement. ... But jurisdiction of this court to compel enforcement of the judgment does not include jurisdictional power to vacate or modify that judgment because of changed conditions; that power lies alone with the trial court which can subpoena witnesses, take evidence and make findings of fact from a preponderance of the evidence. (citations omitted.)

City of Tyler v. St. Louis Railway, 405 S.W.2d 405 S.W.2d 330, 332 (Tex. 1966). After the Supreme Court's decision in Tyler, the case was returned to the trial court and the

permanent injunction was, in fact, vacated on appeal. St. Louis Railway v. Tyler, 422 S.W.2d 780 (Tex. Civ. App.--Eastland 1968, writ ref'd n.r.e.).

Subsequent Texas cases support the proposition that the trial court may modify a permanent injunction as well. City of Seagoville v. Smith, 695 S.W.2d 289 (Tex. App.--Dallas 1985, writ ref'd n.r.e.); State v. Walker, 679 S.W.2d 484 (Tex. 1984). See also, 43A C.J.S. Injunctions § 283 (1978). The standard for modification of a permanent injunction has been stated as follows:

> The rule is that as long as the order concerns a continuing situation, the trial court retains power to change, alter or modify the equitable relief it granted in the form of an injunction upon a showing of changed circumstances.

City of Seagoville v. Smith, 695 S.W.2d at 289; see also Carleton v. Dierks, 203 S.W.2d 552 (Tex. Civ. App.--Austin 1947, writ ref'd n.r.e.).

In light of the changed circumstances, the trial court was within its authority to vacate its original judgment. It is settled law that a trial court has inherent power to open, vacate or modify an injunctive decree "where the continuance of the injunction is no longer warranted; [or] where the circumstances and situations of the parties are shown to have so changed as to make it just and equitable to do so." Carleton v. Dierks, 203 S.W.2d at 557.

Reply Point Four

THIS COURT IS WITHOUT JURISDICTION ON DIRECT APPEAL TO MODIFY AN AWARD OR DENIAL OF ATTORNEY'S FEES.

Direct appeal from a trial court to this Court may be had pursuant to Tex. Gov. Code Ann. § 22.001(c), if the question of the constitutionality of a state statute is called into question. This Court has long recognized that its jurisdiction on direct appeal "is a limited one." Gardner v. Railroad Commission, 160 Tex. 467, 333 S.W.2d 585, 588 (Tex. 1960). When the validity of a trial court's order is presented to this Court on direct appeal and that order contains two severable issues, this Court's authority is limited to determining only the issue involving the constitutional question. See, e.g., Halbouty v. Railroad Commission, 163 Tex. 417, 357 S.W.2d 364, 368 (Tex. 1962), cert. denied sub. nom Dillon v. Halbouty, 371 U.S. 888, 83 S.Ct. 185 (1962).

Plaintiffs complain that the trial court erred in holding that the costs and attorney's fees provision of the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (Vernon 1986), did not apply to the costs incurred by plaintiffs' counsel to lobby the Texas Legislature for a draft of S.B.1 which would satisfy plaintiffs. Section 37.009 provides, "[i]n any proceeding under this

chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just." This Court, on direct appeal, cannot interpret the Uniform Declaratory Judgments Act without going beyond its limited jurisdiction.

Reply Point Five

IN THE ALTERNATIVE, THE TRIAL COURT DID NOT ERR IN HOLDING THAT PLAINTIFFS WERE NOT ENTITLED TO RECOVER ATTORNEY'S FEES.

In addition, and without waiving the foregoing, the trial court did not err in holding that plaintiffs were not entitled to attorney's fees as compensation for their lobbying efforts. The trial court held that the word "proceeding" in the attorney's fees provision of the Uniform Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code Ann. § 37.009, referred only to court proceedings and preparation for those proceedings. Plaintiffs assert that this interpretation of the word "proceeding" "is inconsistent with the rules in the federal courts" which allow recovery for attorney's fees in extra-judicial situations. Appellant's brief at 44. Plaintiffs urge this Court to re-define "proceeding" to include legislative lobbying efforts.

It should be noted, however, that plaintiffs have not cited, and defendants have been unable to find, any authority which supports such an interpretation of § 37.009. Forty-two jurisdictions to date have adopted § 10 of the

Uniform Declaratory Judgments Act, which awards costs at the trial court's discretion in declaratory judgment cases. See Tex. Civ. Prac. & Rem. Code Ann. § 37.001 et seq., Table of Jurisdictions (Vernon Supp. 1990). In not one of these jurisdictions have defendants been able to find even one published opinion which indicates, or even hints, that recovery for costs or attorney's fees may be had for lobbying efforts.

In Texas alone, defendants have found, as of November 9, 1990, sixty-eight published opinions, four opinions scheduled for publication, four opinions not yet released for publication, and five unpublished slip opinions in which a state court has had occasion to apply or discuss the application of § 37.009, plus one Fifth Circuit Court of Appeals opinion, for a total of eighty-two. In every single one of these eighty-two cases, the question of recovery for attorney's fees arose in the context of court proceedings in a declaratory judgment action. Not one of these opinions indicated that recovery under this Section may be had for such extra-judicial activities as those for which plaintiffs now urge recovery. In fact, the language used in many of these opinions indicates that the courts reflexively interpret § 37.009's limitation to court proceedings as beyond question. See, e.g., Oake v. Collin County, 692 S.W.2d 454, 455 (Tex. 1985); Edwin M. Jones Oil v. Pend

Oreille Oil, 794 S.W.2d 442, 448-49 (Tex. App.--Corpus Christi 1990, writ filed); Fuqua v. Fuqua, 750 S.W.2d 238, 246 (Tex. App.--Dallas 1988, writ denied).

It is well settled in Texas that the grant or denial of attorney's fees in a declaratory judgment action lies within the discretion of the trial court, and its judgment will not be reversed on appeal absent a clear showing that it abused that discretion. Oake v. Collin Co., 692 S.W.2d at 692; Briones v. Solomon, 769 S.W.2d 312, 315 (Tex. App.--San Antonio 1989, writ denied). The test is whether the decision of the trial court, based upon the record, is "arbitrary and capricious" (Tripp Village Joint Venture v. MBank Lincoln Centre, 774 S.W.2d 746, 751 (Tex. App --Dallas 1989, writ denied), citing Downer v. Aquamarine Operators, 701 S.W.2d 238, 241 (Tex. 1985)), or "arbitrary or unreasonable" (Inn of Hills v. Schulgen & Kaiser, 723 S.W.2d 299, 302 (Tex. App. -- San Antonio 1987, writ ref'd n.r.e.), citing Landry v. Travelers Ins. Co., 458 S.W.2d 649, 651 (Tex. 1970)).

The legal principle embodied in the expression "abuse of discretion" contemplates some legal error, committed by the trial court in its award or failure to award, that injured or prejudiced the party seeking attorney's fees. Edwin M. Jones Oil v. Pond Oreille Oil, 794 S.W.2d at 448; Jennings v. Minco Technology Labs, 765 S.W.2d 497, 503 (Tex.

App.--Austin 1989, writ denied); for failure to award (see, e.g., Oake v. Collin Co., 692 S.W.2d at 455; and Carr v. Bell Sav. and Loan Ass'n, 786 S.W.2d 761, 765 (Tex. App.--Texarkana 1990, writ denied). Based upon the overwhelming lack of any authority to support plaintiffs' interpretation of § 37.009, the trial court cannot be said to have committed any legal error sufficient to constitute an abuse of discretion in this case.

CROSS-POINTS OF ERROR

Cross-Point of Error One

THE TRIAL COURT ERRED IN DECLARING SENATE BILL 1 UNCONSTITUTIONAL BECAUSE IN DOING SO IT SUBSTITUTED ITS ASSUMPTIONS ABOUT THE EFFICIENCY OF FUNDING WHICH WOULD BE ACHIEVED UNDER SENATE BILL 1 FOR THE ASSUMPTIONS OF THE LEGISLATURE WHICH, AS A MATTER OF LAW, VIOLATES THE DEFERENCE THE JUDICIARY IS REQUIRED TO GIVE TO ACTS OF THE LEGISLATURE.

After one regular session in which significant school finance reform was implemented under the provisions of S.B.1019[4] and six called special sessions, S.B.1 was passed by the Legislature and signed by the Governor on June 7, 1990. Its effective date was September 1, 1990. The trial

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[4]The passage of S.B.1019 predated this court's Edgewood I opinion.

court began hearings on the constitutionality of S.B.1 on July 9, 1990, and closed evidence on July 26, 1990.

Despite the fact that the trial court recognized that it owed deference to the legislative process and that it was required to attempt to construe S.B.1 so as to make the financing system constitutional, it failed to do so. In fact, it could not do so because it determined constitutionality before the dynamics incorporated into S.B.1 had an opportunity to work.

In Vernon v. State, 406 S.W.2d 236 (Tex. Civ. App.--Corpus Christi 1966, writ ref'd n.r.e.) defendants contended that a statute which regulated the incorporation of cities and gave powers to cities which had extra-territorial jurisdiction over unincorporated areas was unconstitutional because it relied on the unlikely possibility that cities would voluntarily agree where there were overlaps of extra-territorial jurisdiction. Absent agreement, the trial court was to apportion territory, which defendants argued was a legislative function. The court held as follows:

> In the field of constitutional law, no stronger presumption exists than that which favors the validity of a statute. A legislative act must be sustained unless it is clearly invalid beyond a reasonable doubt. State v. City of Austin, 160 Tex. 348, 331 S.W.2d 737, 747 (1960); Trapp v. Shell Oil Co., 145 Tex. 323, 198 S.W.2d 424 at 440 (1946).

> The strength of this presumption is nurtured by an appreciation of the needs of the people and by a recognition that laws are directed to problems manifest by experience. The courts will not exert ingenuity to find reasons for holding a statute invalid; rather, they will sustain its validity even if it is valid by the narrowest margins. Texas Nat. Guard Armory Board v. McCraw, 132 Tex. 613, 126 S.W.2d 627-634 (1939); Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269-277 (1944). This is particularly true when the statue pertains to governmental policies established in the interest of public health, safety and welfare as is present in this statute. Lombardo v. City of Dallas, 124 Tex. 1, 73 S.W.2d 475, 486 (1934); 12 Tex.Jur.2d, Constitutional Law, Sec. 36, p. 380.

Vernon v. State, 406 S.W.2d at 242-243. S.B.1 does not establish a rigid or static system of equity such as capping the level of expenditures allowed for education,[5] which might be easier to evaluate on the face of the statute, but rather establishes a dynamic process designed to preserve local district discretion to independently set local tax rates. The design was to build a research base/monitoring function into the system which will drive it to equity within five school years. The S.B.1 system will maintain

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[5]The trial court recognized that the creation of a static system had the long-term effect of restricting growth in per capita pupil expenditures, and inferentially had an impact on the pursuit of adequacy. Appendix III, Opinion at 25-6.

finance equity because of its self-corrective processes in a manner that is unique among the states.

> Question (by Mr. O'Hanlon): ... Has anybody institutionalized, that you know of, a process like S.B.1 has, that is, that we have studies, we have the equity measure and biannual basis to come up with a set of calculations?
>
> Answer (Dr. Forbis Jordan): The combination of those, in statute, is unique.
>
> ...
>
> Question: ... Does any state look at equity measures in either a formal or informal manner?
>
> ...
>
> Answer: Not to my knowledge.
>
> ...
>
> Question: All right. Now if the test ... to be met in this case ... [is] substantially similar yield per penny of tax effort [i]s this system in S.B.1 capable of delivering that?
>
> Answer: Yes... .
> (Jordon testimony) SF 2038-2040

Yet, without letting a day of implementation pass, the trial court found "no purpose in waiting to assess S.B.1. From what is known today, even assuming the best, the court confidently finds that S.B.1 will not provide equity." Appendix III, Opinion at 7. The obvious problem with the trial court's statement is that very little of the system's operation was "known" at the time of trial.

Even Dr. Richard Hooker, expert witness and one of the plaintiffs' staunchest advocates, was not willing to reach the conclusion that the S.B.1 system was incapable of reaching school finance equity.

> Question (by Mr. Luna): ... Is it fair to say--and repeat what you just said that there's no way for you to say that the state can't get there through this bill.
>
> Answer (by Dr. Hooker): There is no way for me to say that. I would have to assume, you know, totally negative and bad things, so I can't say that they can't get there through the general concepts which are in effect.
> SF 445

Contrary to its duty under established law, the trial court had to assume "totally negative and bad things" to determine that S.B.1 could not meet the constitutional mandate of substantially equal access to educational funds for all children. "The rule is that every possible presumption is in favor of the constitutionality of a statute, and such presumption obtains until the contrary is shown beyond a reasonable doubt." Trapp v. Shell Oil, 198 S.W.2d 424, 440 (Tex. 1946). "[W]here a statute is reasonably susceptible of two constructions--one of which will render it unconstitutional--the courts will follow the interpretation which will render the act valid." Dempsey-Tegeler v. Flowers, 465 S.W.2d 209, 215 (Tex. Civ. App.--Beaumont 1971, rev'd on other grounds, Flowers v. Dempsey Tegeler, 472

S.W.2d 112 (Tex. 1971). (The Supreme Court in Flowers said: "The dominant consideration in construing a statute is the intention of the Legislature. We must ascertain the purpose for which the statute was enacted.") The Austin Court of Appeals restated this principal in Lo-Vaca Gathering v. Missouri-Kansas-Tex. R.R., 476 S.W.2d 732, 739 (Tex. Civ. App.--Austin 1972, writ ref'd n.r.e.): "The courts will not presume that the Legislature intended to enact a statute in violation of the Constitution, and the legislation will not be so construed when the law is susceptible of a different construction."

The effect of the assumptions made by the Legislature in its attempt to reach this goal are summarized in the charts which make up defendants' exhibit J-1. Appendix V. These assumptions are explained by the testimony of Lynn Moak. SF 1971-1981. Basically, the charts show that if the State is correct in predicting the local tax response to S.B.1, then the unequalized funds available for education in each year decrease until by 1994-95 at a minimum $1.18 tax effort, 95% of the districts are substantially equalized. Appendix V, J-1 at 4. If the local tax response is instead at $1.25 (J-1 at 5) or at $1.50 (J-1 at 6), then unequalized local enrichment again becomes a problem; but if the State reaches that level of unequalized local enrichment, the Legislature assumes that the study mechanism put in place by

S.B.1 (§ 16.203) would require adjustment to the system. SF 1977-1978. It is simply impossible to project what the future portends for local property taxation. Recent experience indicates that districts have significantly raised local taxation. In the main, local taxation has been driven by four independent factors. First, local taxation was driven by local expenditures required to meet the statutory mandates set forth in H.B.72. The principal cost-producing mandates were the 22 to 1 classroom size; required teacher preparation time; and revised accreditation standards. Tex. Educ. Code § 16.054(b). These costs have largely been absorbed. Second, the recent significant decline in property valuation in the State as a whole has required increased local tax effort to maintain even the current levels of revenues. Third, inflation, with its impact on district costs, has historically impacted local district tax rates. Fourth, many districts have experienced additional costs associated with growth in student population. All of these circumstances have been addressed in the new process. S.B.1, while delivering significant amounts of new revenues, does not contain the costly mandates of previous "reform" packages and even begins the process of deregulation. Further, the State has all but stopped the recent decline in property values and appears poised to enter a period of growth. S.B.1, on the other

hand, provides significant incentives in the form of the equalized funding program for districts to maximize revenues by raising taxes. Issues related to inflation and student growth as factors in determining costs are incorporated into the biennial research process. Data developed since the time of trial[6] indicate that large numbers of districts have raised their local taxes. This is because S.B.1 provides significant incentives for districts to raise taxes to maximize available State recovery. All experts at the trial of this cause recognized that there was a theoretical limit on local tax payers' willingness to tax themselves. However, the equilibrium point has not been established, nor will it be unless and until a finance system is in place long enough for districts to react to any finance incentive placed in formula.

In its Additional Findings, the trial court found that the numbers in J-1 are accurate, given the assumptions, but that the assumptions were improbable. Appendix IV at 1. The trial court is not specific as to what aspects of the assumptions are deemed improbable. Nor is it possible at this juncture to determine what the future portends.

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[6]District tax rate data for the 1990-91 school year was unavailable at the time of trial since districts had not yet set their tax rates.

Recognizing the difficulty of projections, S.B.1 sets overall funding targets and provides the flexibility to adjust if the projections prove inaccurate. It is legal error for a trial court to substitute its assumptions for those of the Legislature. When perceived problems may not arise, the court should not determine the constitutionality of a statute before the actual application of the statute. Kircus v. London, 660 S.W.2d 869, 873 (Tex. App.--Austin 1983, no writ). The courts of this state do not have authority to render advisory opinions. Jester Development v. Travis Co. Appraisal Dist., 775 S.W.2d 464 (Tex. App.--Austin 1989, no writ).

In order to arrive at its conclusion, the trial court had to assume that "substantially equal access to similar revenues per student at similar tax effort" was defeated by eliminating the districts with 5% of the students which had the most money to spend per student. This is the argument made by plaintiff-intervenors at page 6 of their brief. The court's opinion is not so clear and, in fact, tacitly upholds the 5% exclusion in its discussion of the "floating cork" plan offered by the Equity Center. Appendix III, Opinion at 27. Finding that equalization to the 95th percentile or to the 97th percentile destroys substantially equally access substitutes the trial court's judgment for

that of the Legislature's, informed as it was by some of the very experts who testified at trial.

> Question (by Mr. O'Hanlon): ... That's 95 percent. And you supported that standard?
>
> Answer (by Dr. Richard Hooker): In the political process, yes, I did. (SF 315)
>
> ...
>
> Within the broad school finance community, if you were to look at all of the funds, all of the ways in which each of the states fund their programs, you told them you were going to apply the 95 percent standard, I would suggest that you probably would need a body guard and charter plane, because 95 percent is an extremely high standard in the broad school finance community. But, given this bill and given the law, it's attainable. (Testimony of Dr. Forbis Jordan, SF 2020)

The next thing the trial court did to arrive at its conclusion of unconstitutionality was to create a red herring out of the "statistically significant" language of § 16.001(c)(1) and substitute its worst case presumption for the reasonable presumption adopted by the Legislature.[7]

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[7]The trial court's disparaging treatment of § 16.001(c)(1) was inappropriate. The § 16.001(c)(1) language was an attempt to operationalize the Supreme Court's admonition in Edgewood I at 397 that "there must be a direct and close correlation between a district's tax effort and the educational resources available to it." Since correlation analysis is a product of statistical analysis, (Footnote Continued)

The key to continuing equity under S.B.1 is the self-correction process set out in § 16.203. Section 16.001(c)(1) requires that the process work to keep the system fiscally neutral within what would be statistically significant. S.B.1 does not define "statistically significance" and from that the trial court makes much. Yet in doing so, the court must presume that the "impartial panel of persons expert in the use of statistics" required by § 16.203 will not raise red flags as soon as there is any indication that the system is slipping from fiscal neutrality. It is reasonable to assume for purposes of statutory construction that the Legislature required that the temperature of the State's fiscal neutrality in educational funding be monitored by a panel of impartial experts in order to assure efficiency. It is error to assume, as the trial court did, that the panel and the process informed by the panel's analysis will fail in its task. It is error to presume that the Legislature put such a mechanism in place to ignore it. The court cannot call

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(Footnote Continued)
and it was required by the Supreme Court's opinion, it was placed into statute. The process will be informed by an impartial panel of experts selected pursuant to § 16.203(a). These experts have already been selected and are beginning their task. If there is a problem with this approach, it stems not from the statutory language, but from this Court's directive which the statute was designed to reflect.

the statute unconstitutional based on such a scenario until it takes place.

The trial court goes on to substitute its assumptions for those of the Legislature by its tortured reading of § 16.001(c)(2). Here, by finding shades of meaning where they do not exist and by engaging in prejudgment of how decisions will be made in the implementation process, the court condemns S.B.1 by finding that (c)(2) does not establish a floor, i.e., guaranteeing equity at an adequate level, but rather a ceiling, i.e. equity is only guaranteed to an adequate level. Appendix III, Opinion at 12. Both the trial court and plaintiff-intervenors suggest that as a matter of law, if the State chooses a system of combined State and local funding with its "... unintended genius ... that results from the interplay between equity and adequacy," it surrenders its public administration right to attempt to avoid using state dollars to pay for the extravagances of some rich districts. Appendix III, Opinion at 24-28. This notion would turn the constitutional delegation by art. VII, § 1 of authority to the Legislature on its ear. The upshot of both the plaintiff-intervenors and trial court's argument is that the Legislature can fulfill its constitutional mandate only by abandoning any discretion in the provision of educational resources to the collective decision-making of local districts.

Defendants' exhibit J-1 uses $1.18 as a projected tax rate for 1994-95. Appendix V, J-1 at 4. The use of this figure for projection purposes was not intended to present a fixed position as to where the process will set the guaranteed level of the program in future years. It was to illustrate what a future distribution might look like. The trial court turns this projection into fact. Appendix III, Opinion at 16-18. The State offered J-1, pp. 5 and 6 to show that if the 1994-95 tax rate turned out to be $1.25 or $1.50, the system would be losing its fiscal neutrality and the self-correcting mechanism in S.B.1 would signal the need for adjustment. Rather than giving deference to the language in S.B.1 which requires correction if the tax level goes beyond $1.18, the trial court chose instead to establish as fact that it will, and that the committees and boards charged with adjusting school funding to keep it equitable will fail to carry out that task. Apparently, the court prefers an inflexible cap rather than a scheme which tries to be responsive to tax response. Because the Legislature chooses the responsive approach, it is caught by its inability to predict the end result.

> Question (by Mr. O'Hanlon): Do you know what the tax rate of response is going to be next year?
>
> Answer (by Dr. Hooker, plaintiffs' expert): I have no earthly idea... . (SF 350)

Woven through the court's discussion in IV, B, §§ 4, 5, and 6 of its Opinion is a pejorative summarization of the way in which S.B.1 wrestles with the relationship of adequacy and equity, and condemnation because S.B.1 does not control what the court calls "Tier 3." Again, the court substitutes its perspective for the deference it owes to the Legislature's perspective. Adequacy and equity are not opposites; they should co-exist in a sound funding scheme. The Legislature could easily attain equity; it only needs to cap the system at whatever amount it is willing to fund. However, equity without adequacy is meaningless fairness.

> Well, a long time ago I worked with a man who was very interesting and he said that you could equalize poverty, and he was talking about the funding ... in Alabama. And so you can put caps on and ... you can limit expenditures, and ... you achieve equal spending but you do not address the issue of adequacy... . (testimony of Dr. Forbis Jordan, SF 2037).

S.B.1 immediately adds $517,920,000.00 to educational funding in its first year[8] and promises to add considerable amounts and to keep adjusting so that the relationship between where a student lives and the amount spent on her

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[8]This figure is on top of the sum of $247.7 million added through the provisions of S.B.1019 in the same budget cycle. The cumulative addition for the 1990-91 school year is $765.6 million.

education is fiscally neutral. Tier 1 and Tier 2 describe two mechanisms (one mandatory and one voluntary) by which districts receive money from the State to equalize the amounts they can spend on education. Tier 3 is an amorphous "everything else" that any school district may spend on education. S.B.1 is criticized for not equalizing Tier 3. S.B.1 promises to keep capturing more and more of what is purchased in Tier 3 by absorbing it into Tier 1 and Tier 2 to the extent that it is "necessary" for "appropriate" educational programs and "adequate" facilities and equipment. The court determines that the Legislature's judgment here is not constitutional by predetermining that "necessary," "appropriate" and "adequate" will ultimately be defined at a subsistence level. By deciding that Tier 3 must be eliminated, the trial court renders meaningless this Court's statement that its opinion did not mean "that local communities would be precluded from supplementing an efficient system established by the Legislature." Edgewood I, at 398.

Finally, the court sets aside the Legislature's determination to study what funding is required for necessary facilities before designing a mechanism to equalize access to such funding based on nothing but a distrust that future Legislatures will honestly define "adequate." The inventory of school facilities mandated by

§ 16.401 was funded by S.B.11 and is currently going forward. There are over 6,000 campuses in this State that will be required to be inventoried. A plan for the inventory is in place and will be implemented over the next nine months. A data base is currently being designed to manage the data collected and to provide a mechanism to keep facilities information current. The 72nd Legislature will be informed of the status of the project by use of interim reports. The Facilities Advisory Committee required by § 16.403 has met and produced a preliminary plan regarding the State's future role in facilities financing. The State Board of Education will review and adopt standards for facilities and a method of financing them. It is difficult to conceive that the State Board of Education will intentionally lower standards when they are charged with the responsibility of bringing quality to the State's educational system. The plain truth is that, until the State has sufficient information on the status of facilities in this State, it is impossible to define the role the State should play. Given the initial provision of a phase-in period, the Legislature has acted responsibly in carrying out this Court's mandate. While it is true that the Legislature has not yet pulled a rabbit out of the hat with respect to facilities, it is too early to suggest that rabbits are extinct.

There was no evidence in the trial court that the State officials charged with statutory responsibilities imposed by S.B.1 would fail to act responsibly. The effect of the trial court's assumptions was to read Murphy's Law into constitutional analysis and assume that anything that could go wrong, would. Events that have transpired in the implementation of S.B.1 subsequent to the trial court's judgment show the error of the trial court's presumption.

On October 31, 1990, the Foundation School Budget Committee met for the purpose of certifying to the Comptroller of Public Accounts an amount of funds due to be placed in the Foundation School Fund for the upcoming biennium. The meeting was required pursuant to the provisions of the Tex. Educ. Code § 16.256(b). See, 15 Tex. Reg. 6441-2 and 6447-9.

At the October 31, 1990 Foundation School Fund Budget Committee meeting, the committee adopted a formula for computing the certification to the Comptroller. The formula was based upon estimates of student enrollment, and expected tax rate response by local school districts in the upcoming biennium. A formula was necessary since the Legislative Education Board and the Legislative Budget Board have not yet adopted a cost of education index in accordance with Tex. Educ. Code §§ 16.008(b)(2) and 16.203.

On November 7, 1990, the Legislative Education Board and Legislative Budget Board adopted a cost of education index. By Foundation School Funds Budget Committee rule, 19 T.A.C. 201.25, the cost of education index so adopted triggered an automatic reservation of funds by the Comptroller of Public Accounts in the Foundation School Fund.

As of the date of this submission, the following amounts are reserved in the Foundation School Fund for the upcoming biennium: FY '92, $6.255 billion; FY '93, $6.672 billion. See chart on facing page.

The total for the biennium in these figures includes the calculated tax response for the 1990-91 school year and an additional amount has been set aside to cover an anticipated tax response of a 5% increase in local taxation for both the 1991-92 and 1992-93 school years. The provision for anticipated future tax response destroys a major premise of the trial court's opinion. The provision for future tax response is built into the operating rules of the Foundation School Fund Budget Committee. 19 T.A.C. § 201.9(b)(2), at 15 Tex. Reg. 6441 On pages 19-20, (Cycles of Funding) the trial court wrote that poor districts would be perpetually delegated to chasing the rich. The provision of funding for anticipated tax response presumes future tax

increases and provides funding for anticipated future behavior.

The immediate impact of S.B.1 on State appropriations for public education can be seen by the chart facing page 38. Prior to S.B.1, the 71st Legislature had set aside $5.228 billion for the Foundation School Program for the 1989-90 school year (FY '90) and $5.351 billion for the Foundation School Program for the 1990-91 school year (FY'91). The total biennial appropriation for education was approximately $10.579 billion. In the very next biennium, by action of the Foundation School Fund Budget Committee, $6.255 billion is reserved for the 1991-92 school year (FY '92) and $6.667 billion is reserved for the 1992-93 school year (FY '93). The combined total of $12.927 billion represents an increase of 2.348 billion dollars or an increase of approximately 22% in State aid from one biennium to the next. It is incorrect to infer, as the trial court did, that the process of S.B.1 was designed or intended as a method to escape the State's responsibility to adequately and equitably fund school finance reform.

The trial court's use of projections from fiscal notes attached to S.B.1 is the source of its ultimately erroneous conclusion. The trial court correctly found that the State's projected cost of financing the Foundation School Program prior to S.B.1 for the 1990-91 school year to be

$5.3 billion. Appendix III, Opinion at 30. However, using the minimum budgeted estimate set by the fiscal note which accompanied S.B.1 (assuming no tax response or other adjustment), the court erroneously found that S.B.1 would only add $1.2 billion to the system by the 1994-95 school year. The Foundation School Fund Budget Committee has already reserved $6.677 billion for the 1992-93 school year, an increase of $1.37 billion from the base year used for analysis by the trial court. This figure only counts total State aid. Because, as demonstrated above, State aid is significantly driven by local taxing patterns which are themselves a part of the Foundation School Program, the actual revenues contained within the Foundation School Program by the 1992-93 school year will significantly exceed those projected by the trial court for the 1994-95 school year. These errors were made by judging S.B.1 before any evidence was available to show how it would actually be implemented.

Defendants maintain that it was error for the trial court to decide, before any of the dynamics of S.B.1 were implemented, that it would result in an unconstitutional system. To so find, the court impermissibly substituted its presumptions for those of the Legislature. It rendered an advisory opinion based on speculation instead of waiting until there was real evidence. If this Court declines to

sustain this point of error, then it is entering the debate as to whether S.B.1 will or will not work, which, as argued below, is a fact question over which this Court has no jurisdiction.

Cross-Point of Error Two

ALTERNATIVELY, IF IT WAS NOT ERROR AS A MATTER OF LAW FOR THE TRIAL COURT TO DECLARE SENATE BILL 1 UNCONSTITUTIONAL, THE ASSUMPTIONS MADE BY THE TRIAL COURT IN SO DOING RAISE FACT ISSUES OUTSIDE THE JURISDICTION OF THIS COURT.

If defendants are not entitled to reversal of the trial court's finding of unconstitutionality because the trial court committed legal error in pre-judging S.B.1 before implementation, then defendants maintain that the Court must involve itself in fact-finding in this case which is beyond its jurisdiction. Rule 140b, Texas Rules of Appellate Procedure, governing direct appeals, prohibits this Court from taking jurisdiction over any question of fact. This is pursuant to art. V, § 3-b of the Texas Constitution. If there are contested issues of fact, the appeal should be dismissed. Dodger v. Depuglio, 209 S.W.2d 588, 592 (Tex. 1948). The posture of this case is unique in that at the time of trial and at the time the court wrote its opinion, there were no facts about how S.B.1 would be implemented; there were only projections and speculations. The Court specifically recognized this problem and specifically found

that it could act on probabilities established by the preponderance of evidence. Appendix IV, Additional Findings at 3. To decide whether or not S.B.1 will work, appellate review at a minimum will have to weigh the testimony of experts and the evidence regarding the school districts and their taxing patterns, and decide whether eliminating the districts which fall into the top 5% in terms of their ability to spend money on education does, in fact, prevent Texas' funding system from ever reaching equity at a meaningful level of adequacy. It will have to sift through the evidence to find as a matter of fact that the method designed to signal that the system's neutrality must be corrected, the panel of independent statisticians, was designed as a sham. It will have to find as a matter of fact that future members of the Legislative Education Board, the Legislative Budget Board or the Foundation School Board will define "necessary," "adequate," and "appropriate" at a level which will deprive some children in Texas an efficient education. It will have to find as a matter of fact that no matter how high the equalized yield goes, some significant number of school districts will spend above that amount and, thereby, deprive other children in Texas an efficient education. Hand in hand with this finding, appellate review will need to find, as a matter of fact, that no matter how much money the State puts into the educational system, it

will never reach adequacy. Additional fact issues are suggested by defendants' objections to plaintiffs' statement of facts above at xiii.

Another decisional exercise available in this case would be to choose from one of the other options proposed to the 71st Legislature. This is, in fact, what plaintiffs urge the Court to do. Again, this would involve a weighing of facts at least to the point of establishing what the proponents of each believe the measures will accomplish. For example, see fn 3 above describing the issues raised by the Uribe-Luna plan. The district court reviews the other proposals at page 24 of its opinion and suggests the fact issues presented.

Perhaps the conclusion of this Court will be that it does not matter as a question of fact whether S.B.1 will work or not, because as a matter of law, unless a system incorporates caps or total state funding, or consolidation of districts or tax bases, it offends the Constitution. If that is the case, it is a new legal standard not previously announced by this Court. If that is not the case, a factual review of the record is necessary and the case must be remanded to the Court of Appeals.

Cross-Point of Error Three

THE TRIAL COURT ERRED IN APPLYING A STANDARD OF TOTAL EQUALITY RATHER THAN THIS COURT'S STANDARD OF SUBSTANTIAL EQUITY.

In its treatment of local unequalized enrichment, the trial court seems to reject the Supreme Court's modification of Judge Clark's original opinion. Though acknowledging that this Court has modified Judge Clark's equal access standard to substantially equal access, the trial court, by centering its opinion on the idea that the State must make Tier 3 disappear and that it can exercise no control over defining "adequate," "necessary" and "appropriate" has, in reality, used Judge Clark's standard. The confusion is evident in the following sentence from the trial court's opinion: "'Thus, the Supreme Court expressly provided that local enrichment must derive solely from tax effort,' as opposed to greater available wealth." Appendix III, Opinion at 19. This language strategically eliminates the word "local" from the Supreme Court's language. The deletion was a misquotation designed to arrive at a pre-determined position that appears to defendants as a reinstatement of the original, absolute standard of fiscal neutrality. If this part of the trial court's opinion stands, the simpler

expedient is to cap tax rates at the maximum tax rate guaranteed by the guaranteed yield program.[9]

The trial court then apparently retreats from this stance in Section V of the opinion Appendix III, Opinion at 24-31. The trial court, after rejecting virtually every other type of finance plan, seems to allow the potential of an equalization plan that permits local unequalized enrichment. At page 27, the trial court seemingly endorses an equalization plan that allows unequalized enrichment.

The Legislature was induced to permit some unequalized enrichment by the express language of the Supreme Court's Edgewood I opinion.

> Nor does it mean local communities would be precluded from supplementing an efficient system established by the Legislature: however any local enrichment must derive solely from local tax effort.

Edgewood I at 398.

The Legislature fairly read the inclusion of this sentence as referring back to the Hightower/Mauzy debate at the Constitutional Convention in 1974. The inclusion of this provision in the Court's Edgewood I opinion was read in the same way as similar language was widely interpreted in

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[9]Currently set at § 1.18 in 1994-95.

the draft constitution; that is, some local enrichment was tolerable so long as the system as a whole remained equitable. The trial court's reasoning notwithstanding, the provision is hard to read in any other way when placed in its historic context.[10]

The term "local enrichment" has always meant, in school finance parlance, those funds which a district raises outside the Foundation School Program. (The trial court refers to this as the "Third Tier.") These funds have always derived solely from local tax effort. Placing this sentence in the context of the Supreme Court's modification of Judge Clark's Final Judgment, the Legislature read Edgewood I as a whole to authorize some local, unequalized enrichment (Tier 3) so long as the system, taken as a whole, provides substantially equal access to similar revenues per pupil at similar levels of tax effort. The Legislature obviously intended to keep local, unequalized enrichment in mind since it adopted verbatim the Supreme Court's test of fiscal neutrality in the funding principle set forth in Tex. Educ. Code § 16.001(b).

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[10]The historic significance of the Constitutional debates between Hightower and Mauzy was discussed during the Edgewood I oral argument on July 5, 1989.

CONCLUSION

S.B.1 was a good faith effort by the 71st Legislature to deal with the complex issues of school financing and to meet the specific language of this Court's mandate. Appendix III, Opinion at 38. The trial court criticized it for writing history into law. Yet, the court itself recognized that the infusion of state dollars at various points in history had the effect of closing the gap between revenues available to rich and poor. Appendix III, Opinion at 20. S.B.1 will put a considerable amount of money into the system and virtually eliminates the existing amounts of current unequalized enrichment. It attempts to correct where history failed before by providing a mechanism to regularly check the fiscal neutrality of the system. By mandating that the Foundation School Fund Budget Committee, the Legislative Education Board and the Legislative Budget Board adjust funding formulae in the circumstance of imbalance in fiscal neutrality, the finance will remain "efficient." The trial court recognized that capping the system even at the level of expenditure of the district at the 95% would cap it at below the national average. Appendix III, Opinion at 21. In the end, the trial court's judgment was based upon the fact that it did not trust the various elected officials involved in the process to make the right decisions. TEX. CONST. art II, § 1 requires the

courts to give deference to co-equal branches of government. S.B.1 provided a set of standards consistent with the Edgewood I opinion. Those standards were obviously based upon assumptions and projections about future events. The district court erred in failing to give deference to the Legislature's assumptions and in setting S.B.1 aside before implementation.

PRAYER

WHEREFORE, PREMISES CONSIDERED, defendants pray that this Court uphold the trial court's denial of injunctive relief and decline to assume jurisdiction of the attorney's fee issue, or, alternatively, uphold the trial court's award of limited fees. Defendants further pray that this Court find that the trial court erred in declaring S.B.1 unconstitutional before it had a chance to be implemented and reverse the trial court's finding of unconstitutionality. If this Court determines that it was not error for the trial court to substitute its assumptions for those of the Legislature, then defendants urge the Court to remand the question of the constitutionality of S.B.1 to the appellate court for factual review.

Respectfully submitted,

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DEFENDANTS BELOW

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested, on this the 15th day of November, 1990 to all counsel of record.

TONI HUNTER
Assistant Attorney General

Foundation School Program Allocations

Amounts in Millions

	School Year 1989–90	School Year 1990–91	School Year 1991–92	School Year 1992–93
Original Appropriations,				
SB 222, 71st Regular	5,025.3	5,1[illegible]		
Additional Appropriations,				
SB 1019, 71st Regular	202.3	247.7		
Subtotal, Before SB 1	5,227.6	5,350.7		
Additional Appropriations,				
SB 11 (SB 1), 6th Called Session		517.9		
Total including SB 1	5,227.6	5,868.6		
Cost to Continue SB 1, Fiscal Note as of 6–5–90				
At Current Tax Effort			6,087.9	6,388.5
At Maximum			6,157.0	6,669.8
Cost to Continue SB 1 as of 10–31–90				
At Current Tax Effort			6,219.6	6,527.2
With 5% Tax Effort Increase (as certified by FSFBC under TEC Sec. 16.256(b) and reserved byComptroller in revenue estimate)			6,254.8	6,672.4
At Maximum (assumes each district maximizes entitlements)			6,267.3	6,725.9
Difference between certified and potential maximum			12.5	53.5

Foundation School Program Allocations includes all items appropriated as Foundation School Program in the General Appropriations Act.

D 0378

DIRECT APPEAL

No. D-0378

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IN THE

SUPREME COURT OF TEXAS

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EDGEWOOD INDEPENDENT SCHOOL DISTRICT, et al.,

Petitioners

V.

WILLIAM N. KIRBY, et al.,

Respondents

* * * * * * * * *

APPENDIX TO

BRIEF OF STATE-APPELLEES AND CROSS-APPELLANTS

* * * * * * * * *

No. D-0378

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APPENDIX TABLE OF CONTENTS

SUPREME CT.
EDGEWOOD I DECISION

(1) The legislature finances the education of these children through a combination of revenues supplied by the State itself and revenues supplied by local school districts which are governmental subdivisions of the State.

Edgewood at 392 Col 1

S. B. 1

S.B. 1 continues concept of State/local sharing however these have been significant adjustments in the methodology and amounts guaranteed.

Art. 16.101 Raises basic allotment to 1910 in 1990-91 and 2128 for 1991-92 and 1992-93. Amount in 1993-94 and beyond to be adjusted by FSFBC after study.

Art. 16.102 Cost of education allotment is to be set by 1/1/91 by FSFBC, replaces price differential index and small/sparse adjustments. New index has been adopted by LEB/LBB and will be set by FSFBC at meeting on 12/20/90.

Art. 16.252 Local share of program increased from 33% to 41% ($.54) in 1991. Amount then increases to $.70. Effect is to raise all district costs for first tier to $.70 and free more state revenues for second tier. Collateral effect is to absorb current enrichment in combination with guaranteed yield system below.

Art. 16.303 Guaranteed yield system substantially enhanced. Guaranteed rate is $.37 in 1990-91 and $.48 thereafter. This is on top of tier 1 raising system to guaranteed level of $1.18 by 1994-95.

SUPREME CT.
EDGEWOOD I DECISION

S. B. 1

Art. 16.302 Sets guaranteed yield at $17.90 per weighted student for 1990-91 and at least $26.05 for 1991-92 and therefore FSFBC can adjust the guaranteed amount upward. Amount guaranteed can be increased by appropriation.

SUPREME CT. EDGEWOOD I DECISION	S. B. 1
(2) State revenues derived from sales, severance & excise taxes. Local revenues from local ad valorem taxes. Edgewood at 392 Col 1	No change in general sources of revenues. Sales tax increased H.B. 6, cigarette taxes increased, liquor taxes increased H.B. 6, miscellaneous drivers license fees increased H.B. 5.

SUPREME CT. EDGEWOOD I DECISION	S. B. 1
(3) Glaring disparities in wealth caused by variations in property wealth. Edgewood at 392 Col 1	No direct change in school district boundaries. However, Commissioner of Education under TEC § 21.757(g) for first time given power to annex low performing districts to other districts as part of accreditation process. Court's concern will be ameliorated over time.

SUPREME CT.
EDGEWOOD I DECISION

S. B. 1

(4) Foundation School Program does not cover cost of meeting state mandated programs.

...Basic allotment understands actual costs....

Edgewood at 392 Col 2

TEC 16.101 Basic allotment was $1350 at time of Edgewood I. Basic allotment raised to $1910 in 1990-91 and $2128 in 1991-92 & 1992-93.

In 1993-94 the basic allotment will be adjusted in accordance with 16.008(b) (LEB) and 16.256(e) (FSFBC) informed by studies conducted pursuant to 16.202(a)(2). All three statues require that the basic allotment "represents the cost per student of a regular education program that meets the basic criteria for an accredited program including all mandates of law and regulations."

Thus, this provision in Supreme Court's Opinion has been met.

SUPREME CT.
EDGEWOOD I DECISION

(5) No Foundation School Program allotments for school facilities and debt services.

Edgewood at 392 Col 2

S. B. 1

TEC 16.008(b)(5 & 6) includes facilities monies in one of two ways.

(5) Requires subchapter H (guaranteed yield program on second tier) to include tax rates for capital outlay and debt service unless separate facilities formula is adopted.

(6) Provides for separate facilities formula to be developed in future.

TEC 16.256(e)(5 & 6) mirror 16.008 provisions and make them applicable to FSFBC deliberations.

S.B. 11 Chapter 27

§ 3.05 appropriates $5,000,000 to fund facilities inventory defined in T.E.C. § 16.401.

TEC § 16.402 & § 16.403 provides for the establishment of statewide facilities standards. (H.B. 1019, 1989).

TEC § 14.063 Technology allotment established beginning in 1992-93 at least at $30.00/ADA increasing to at least $50.00/ADA in 1996-97.

Thus Court's mandate will be next.

SUPREME CT. EDGEWOOD I DECISION	S. B. 1
(6) Transportation allotment understates actual costs. Edgewood at 392 Col 2	§ 16.008(b) Requires biennial recalculation of costs of transportation for submission by LEB to FSFBC. § 16.256(e) Requires adoption of new cost elements by FSFBC not later than 11/1/92 [§ 161.256(f)]. § 16.202(a) Provides for studies by the LEB & LBB with the assistance of Educational Economic Policy Center and Central Education Agency to inform the process. Thus Court's mandate will be next.

SUPREME CT.
EDGEWOOD I DECISION

S. B. 1

(7) "...Almost all school districts spend additional funds..." (outside equalized program).

Edgewood at 392 Col 2

Local enrichment will continue to be allowed, however:

§ 16.101 Basic allotment raised to $1910 in 90-91, at least $2128 in 91-92 and thereafter.

§§ 16.008(b), 16.202(a)(2), and 16.256(e) all require basic allotment to cover basic program costs.

§ 16.252(a) raises tier 1 tax rate to $0.70 per hundred dollars.

§ 16.301 guaranteed yield program enhanced.

§ 16.302(a) raises guaranteed yield rate from $17.90 in 90-91 to at least $26.05 for 91-92 and beyond.

§ 16.303(a) provides for increase in enrichment tax rate from $0.37 in 90-91 to at least $0.48 thereafter.

Combination of above statutory provisions, guaranteed rate of $1.18 covers most currently existing tax rates (see the Exhibit J.1. p.4)

§§ 16.001, 16.008, and 16.256 require adjustment in the event fiscal neutrality is not maintenance.

§§ 16.202 and 16.203 provide for fiscal neutrality.

Whole design of the system is to reduce unequalized enrichment to a minimum in order to meet Court's mandate.

In summary, if significant number of districts are raising any significant amount of local unequalized enrichment, the system is designed to detect the practice and correct it.

SUPREME CT. EDGEWOOD I DECISION	S. B. 1
(8) Low wealth districts use significantly greater proportion of local funds for debt services while high wealth districts use local funds for enrichment. Edgewood at 392 Col 2	§ 16.301 guaranteed yield program specifically designed to include debt service within equalized program unless specific capital outlay and debt service component is created. § 16.256(e) 5 & 6 and § 16.008(b) 5 & 6 provide for facilities funding either under second tier or separate facilities component. § 16.401 provides for statewide facilities study funded by 5 million appropriation by S.B. 11 (71st Leg. 6th CS.). § 16.402 & § 16.403 provide for facilities standards in the first year of S.B. 1 alone the $.91 guaranteed first and second tier rates equalizes significant portions of local debt as guaranteed rate rises more debt services will be covered. § 14.603 creates equalized technology allotment in 92-93 and beyond V.A.T.S. 717t-1 provides for public school facilities development grants for the 91-92 school year to be issued by Bond Review Board. In summary, the statutory scheme has been revised to bring facilities within the equalized school finance program. Thus meeting Court's mandate.

SUPREME CT. EDGEWOOD I DECISION	S. B. 1
(9) Because of inadequate tax base poor districts must tax themselves at significantly higher rates to meet minimum requirements for accreditation. Edgewood at 393 Col 1	§§ 161.256(e) 1, 16.202(a) 2, and 16.008(b) 1 all require that the costs of meeting minimum requirements for accreditation be covered by the basic allotment (16.101 et seq.). Basic allotment raised to $2128 in 91-92. Basic allotment will be adjusted to reflect accredited program costs in 93-94 and beyond. Tax rate for tier 1 which includes basic allotment plus special allotments (weights) moves to $0.70 in 91-92 and beyond. Tax rate for first tier can be adjusted by FSBFC under § 16.256(e) 5. Under the outlined process at least 95% of districts in the State will be able to have equal access to funds for accredited program [Tier 1, see 16.002(b)] at the same tax rate, the rate is currently set at $0.70 for 91-92 and beyond. Tier 1 is designed to provide equal access to revenues. At the mandatory, fixed state rate to meet all minimum accreditation requirements. Court's mandate has been met.

SUPREME CT. EDGEWOOD I DECISION	S. B. 1
(10) Wealth in its many forms has not appeared with geographic symmetry. The economic development of the state has not been uniform...formulas that once fit have been knocked askew. Although local conditions vary, the constitutionally imposed responsibility for an efficient education system is the same for all citizens regardless of where they live. Edgewood at 396 Col 1 & 2	S.B. 1 does not correct the problem of district wealth variation, district reconfiguration may for the short time reimpose symmetry but as history has dictated, the process of nonuniform economic development will repeat itself. The only potential long term solution to resolve the local base variation problem is statewide taxation. Statewide property taxation is however prohibited by Tex. Const. Art. VIII, §(1)(e).

SUPREME CT. EDGEWOOD I DECISION	S. B. 1
(11) More money allocated under the present system would produce some of the existing disparities between districts but would at best only postpone the reform that is necessary to make the system efficient. A bandaid will not suffice; the system itself must be changed. Edgewood at 397 Col 2	S.B. 1 is a considerably different approach than the mere injection of additional funds. It represents a clear standard of adequacy and equity in Tex. Educ. Code § 16.001 together with the mechanism to keep the system in equilibrium. §§ 16.008 and 16.256. The finance system is fully capable of producing equity and will be responsive to new developments. On October 31, 1990 the Foundation School Fund Budget Committee significantly raised the level of fund reservation under § 16.256(b) to 6.254 billion dollars for the 91-92 school year and 6.667 for the 92-93 school year. The decision represents a 22% increase in 92-93 over the pre-S.B. 1 level for 90-91. Much of the funding increase was required by the district tax response which was monitored and accounted for by the S.B. 1 system. The amount currently in the system for the 92-93 school year exceeds the fiscal note minimum for 94-95. The FSFBC has already put more money into the system within the first 6 months of operations under S.B. 1 than the trial court assumed would be put in over the entire 5 year period of analysis by the trial court. (See chart in brief.) The system constitutes a fundamental change in the way Texas finances public education and should be allowed to work.

SUPREME CT. EDGEWOOD I DECISION	S. B. 1
(12) There must be a direct and close correlation between a district's tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort. Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds. Edgewood at 397 Col 2	Direct and close correlation...is specifically required by § 16.001(c)(1). Substantially equal access to similar revenues per pupil at similar levels of tax effort...is specifically required by § 16.001(b). Access to education funds 16.002. Court's mandate has been met.

SUPREME CT. EDGEWOOD I DECISION	S. B. 1
(13) In setting appropriations, the legislature must establish priorities according to constitutional mandate; equalizing educational opportunity cannot be relegated to an "if funds are left over" basis. Edgewood at 397-398	§ 16.256(b) provides for the preservation of funds in the available school fund by the comptroller of public accounts upon the certification of the Foundation School Fund Budget Committee. Funds so reserved are not available for other appropriation. Court's mandate has been met.

SUPREME CT. EDGEWOOD I DECISION	S. B. 1
(14) This does not mean that the State may not recognize differences in area costs, or in costs associated with providing an equalized educational opportunity to a typical student or disadvantaged students. Edgewood at 398 Col 1	Chapter 16 Tex. Educ. Code, Subchapter D. Special allotments, § 16.151 et seq. provides for the continuation of special allotments as previously approved by the Supreme Court in Edgewood I. §16.256 and § 16.008 provide for the periodic adjustment of the special allotments as cost change or other needs arise. Thus the previously approved program has been made more flexible and responsive to future needs. Court's admonition has been met.